In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1395

CARMINE G. DESAPIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a lengthy jury trial with co-conspirator Antonio Corallo in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy (18 U.S.C. 371) to violate 18 U.S.C. 1951 and 1952 and of two substantive violations of the latter section. He was sentenced to concurrent two-year prison terms and to fines of $1,500 on each of the three counts. The court of appeals affirmed in a comprehensive opinion, 435 F. 2d 272 (Pet. App. A).

In brief, petitioner was charged with and found guilty of having conspired with one Henry Fried and others to bribe James Marcus, then Commissioner of the New York City Department of Water Supply, Gas and Electricity, to withhold permits from Consolidated Edison Company of New York, Inc., until it would agree to award construction contracts to Fried's companies.

The complex facts of this case are fully detailed in the opinion of the court of appeals (Pet. App. A 3a-13a).

Petitioner here reasserts claims considered and rejected by the court of appeals: (1) that certain testimony by and concerning Herbert Itkin, a government informer, should have been excluded, on the grounds that he was not a member of the conspiracy and that, in the circumstances of this case, the government's actions on this score were fundamentally unfair (Pet. 21-28, answered at Pet. App. A 16a-20a); (2) that the district judge's *in camera* inspection of government materials showing Itkin's relationship with the government and the restrictions on defense counsel's examination of these materials was inconsistent with *Alderman* v. *United States*, 394 U.S. 165 (Pet. 28-29, answered at Pet. App. A 24a);[1] (3)

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[1] *Alderman*, of course, involved a defendant's right to see evidence allegedly obtained from him or his premises in violation of his Fourth Amendment rights, so that he could effectively litigate the question whether other evidence used against him should be suppressed as the fruit of such illegal evidence. The contention in this case arises in the very different context of an effort to discover information, not

that the judge improperly admitted evidence concerning events after termination of the conspiracy (Pet. 29-31, answered at Pet. App. A 21a-23a); (4) that the prosecution failed to disclose relevant facts concerning one of its witnesses as required by *Brady* v. *Maryland*, 373 U.S. 83 (Pet. 31-34, answered at Pet. App. A 25a-31a); and (5) that petitioner was improperly denied a trial separate from that of his co-conspirator Corallo (Pet. 34-36, answered at Pet. App. A 14a-16a).

We rely here on the thorough treatment of these matters by the court of appeals; for the reasons stated in the opinion below the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

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directly involving petitioner, about a third-party witness' activities; the *Alderman* opinion itself distinguishes the use of *in camera* procedures in this context, 394 U.S. at 182-183 note 14.

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